

REMARKS:

Claims 2-10, 15-20, and 22-29 remain in the application.

Claims 2-10 and 29 stand rejected under 35 U.S.C. § 103(a) over MAPICS software in view of U.S. Patent No. 6,115,690 to Wong ("Wong"). Claims 15-20 and 22-28 stand rejected under 35 U.S.C. § 103(a) over MAPICS software in view of Wong, further in view of DataMirror's software.

REJECTIONS UNDER 35 U.S.C. § 103(a):

Claims 2-10 and 29

Claims 2-10 and 29 stand rejected under 35 U.S.C. § 103(a) over MAPICS software ("MAPICS") in view of U.S. Patent No. 6,115,690 to Wong ("Wong"). The Office Action relies on the disclosure of the following documents as being descriptive of MAPICS, and thus a basis for the present rejection:

Reference A: Web.archive.org's MAPICS.com webpage titled "technology AS/400e"

Reference B: Web.archive.org's MAPICS.com webpage titled "Future Directions"

Reference C: Web.archive.org's MAPICS.com webpage titled "Products Overview"

Reference D: Web.archive.org's MAPICS.com webpage titled "Products Demand"

Reference E: Web.archive.org's MAPICS.com webpage titled "Resource Planning"

Reference F: Bruce Wassell's www-919.ibm.com webpage titled "MQSeries for
AS/400 V5.1"

Reference G: Web.archive.org's MAPICS.com webpage titled "MAPICS XA Product
Family"

Claims 2, 3, and 5-10 depend from independent claim 4. Because the proposed combination of MAPICS and Wong fails to disclose or suggest all of the limitations of claims 2-10, these claims cannot be rendered obvious by the proposed combination of MAPICS and Wong.

Specifically, claim 4 as amended recites, in part:

one or more secondary HA systems operable to process
requests not requiring modification of the planning information; and
the message manager is operable to:

*direct requests received from external systems and requiring modification of the planning information to the primary HA system;
and
direct requests received from external systems and not requiring modification of the planning information to one of the secondary HA systems.*

(Emphasis added) The Office Action concedes that MAPICS and Wong do not teach all of the limitations of claim 4:

MAPICS and Wong do not teach:
**direct requests received from external systems and requiring modification of the planning information to the primary HA system;
and
direct requests received from external systems and not requiring modification of the planning information to one of the secondary HA systems.¹**

Thus, while claim 4 is rejected over the combination of MAPICS and Wong, the Office Action does not rely on the teachings of MAPICS and Wong for supporting an allegation that the above limitations are obvious. Instead, the Office Action indicates that Official Notice is taken:

The examiner takes Official Notice that it is old and well known in the art of queuing theory to direct different kinds of requests, including those requiring modification of planning information and those not requiring modification of planning information, to various systems in order to balance workload information and in accordance with the priority of the particular request.²

Applicant hereby traverses the Official Notice because the asserted facts are not supported by adequate documentary evidence and appear to be based on opinions formulated using the present application as a template, which constitutes impermissible use of hindsight.

The only document cited in support of the Official Notice is Johnston, Samuel, "Communicating with Sam – Disaster Recovery Planning and High Availability,"

¹ Office Action, page 11, lines 14-19, emphasis in original.

² Office Action, page 12, lines 1-5.

September 1997, Toronto Users Group, Vol. 13, No. 1, pp. 1-3, http://www.tug.ca/articles/Volume13/V13N1/V13N1_Sam_DRP-HA.html ("Johnston"). However, as discussed below, Johnston fails to provide adequate documentary evidence for supporting the Official Notice.

The Office Action cites the following disclosure of Johnston, alleging that Johnston teaches dispatching low-priority requests to a secondary system:

Assuming you are running OSPF in your routed network, the redundant WAN node with a local backbone connection on the back to the host site, can also improve day-to-day network performance via flow control when congestion is occurring at the host WAN node (sic) In designing your Availability strategy,....³

However, this allegation is respectfully traversed. The above-cited portion simply discusses integration of a second node into a flow control strategy. This implies nothing related to message prioritization. Thus, the above-cited portion of Johnston is silent with respect to dispatching lower priority requests to a second node.

It is noted that the Office Action seems to interpret the term "flow control" to encompass message prioritization. However, such an interpretation of "flow control" is over-reaching, apparently based on improper hindsight. The term "flow control" simply refers to buffering data during data transmission so as not to overload the receiving device.⁴ However, "flow control" does not imply anything related to prioritizing messages, or re-routing messages based on priority. Thus, for at least this reason Johnston fails to properly support the official notice.

The Office Action also cites the following disclosure of Johnston, alleging that Johnston teaches messages requiring/not requiring modification to planning:

³ Johnston, page 2, last line – page 3, line 2.

⁴ *High-Tech Dictionary Definition*, <http://www.computeruser.com/resources/dictionary/definition.html?lookup=2735>; *Dictionary of Computers – flow control*, <http://www.computeruser.com/resources/dictionary/definition.html?lookup=2735>; *flow control from FOLDOC*, <http://foldoc.doc.ic.ac.uk/foldoc/foldoc.cgi?flow+control> (copies attached).

- How mission critical is my system to daily business operations? remember, (sic) an accounting backlog can be recovered, but inability to process orders or run factories may mean lost sales and lost customers⁵

Here, the Office Action alleges that the mention of an accounting backlog in the text above constitutes a teaching of messages not requiring modification, and that the mention of processing orders constitutes a teaching of messages requiring modification. However, this again seems to be over-reaching, perhaps based on improper hindsight, as the above text includes no discussion as to messages or modifications.

The Office Action further alleges that these alleged teachings of Johnston result in a teaching of prioritizing messages according to whether they require modification to planning information. Even assuming *arguendo* that Johnston included the alleged teachings of dispatching low-priority requests to a secondary system and messages requiring/not requiring modification to planning (although no such concession is made), there is certainly nothing in Johnston, or pointed out in the Office Action, linking the two concepts to arrive at a teaching of prioritizing messages based on whether the messages require modification of planning information.

Therefore, for at least the reasons set forth above, it is respectfully submitted that Johnston fails to disclose the following limitations of claim 4:

direct requests received from external systems and requiring
modification of the planning information to the primary HA system; and
direct requests received from external systems and not requiring
modification of the planning information to one of the secondary HA
systems.

As such, it is respectfully submitted that Johnston fails to provide adequate support for the official notice.

In light of the discussion above, it is respectfully submitted that Johnston fails to provide adequate documentary evidence for supporting the Official Notice. It is therefore maintained that the Office Action provides no documentary evidence to support the Official

⁵ Johnston, page 3, paragraph 1, lines 4-5.

Notice taken by the Examiner, yet the asserted facts are not capable of "instant and unquestionable" demonstration as being well-known.

"Official Notice without documentary evidence to support an examiner's conclusion is permissible only in some circumstances. While 'official notice' may be relied upon, these circumstances should be rare when an application is under final rejection or action under 37 C.F.R. 1.113. Official notice unsupported by documentary evidence should only be taken by the examiner where the facts asserted to be well-known, or to be common knowledge in the art are capable of instant and unquestionable demonstration as being well-known. As noted by the court in *In re Ahlert*, 424 F.2d 1088, 1091, 165 USPQ 418, 420 (CCPA 1970), the notice of facts beyond the record which may be taken by the examiner must be 'capable of such instant and unquestionable demonstration as to defy the dispute'(citing *In re Knapp Monarch Co.*, 296 F.2d 230, 132 U.S.P.Q. 6 (C.C.P.A. 1961))." MPEP § 2144.03(A) (emphasis in original).

"It would not be appropriate for the examiner to take official notice of facts without citing a prior art reference where facts asserted to be well known are not capable of instant and unquestionable demonstration as being well-known." MPEP § 2144.03(A) (emphasis in original).

Thus, if the Examiner continues to maintain the rejection of the claims based on the Official Notice, the Applicant requests that the Examiner provide documentary evidence as stated in Section 2144.03 of the M.P.E.P. Further, if the Examiner is relying on personal knowledge to support the finding of what is known in the art, Applicant requests that the Examiner provide an affidavit or declaration setting forth specific factual statements and explanation to support the finding. (See MPEP § 2144.03(C)).

Independent claim 29 recites limitations similar to those discussed above in connection with claim 4, and is therefore considered allowable for the same reasons discussed above in connection with claim 4.

For the reasons set forth herein, the Applicant submits that claims 2-10 and 29 are not rendered obvious by the proposed combination of MAPICS and Wong. The Applicant

further submits that claims 2-10 and 29 are in condition for allowance. Therefore, the Applicant respectfully requests that the rejection of claims 2-10 and 29 be reconsidered and that claims 2-10 and 29 be allowed.

Claims 15-20 and 22-28

Claims 15-20 and 22-28 stand rejected under 35 U.S.C. § 103(a) over MAPICS in view of Wong, further in view of DataMirror's software ("DataMirror").

Independent claims 15, 22, and 28 recite limitations similar to those discussed above in connection with claim 4, and are therefore considered allowable for the same reasons discussed above in connection with claim 4. It is respectfully submitted that DataMirror fails to cure the deficiencies discussed above. Since claims 16-20 depend from claim 15, and claims 23-27 depend from claim 22, these claims are considered allowable for at least the reason of depending from an allowable claim.

For the reasons set forth herein, the Applicant submits that claims 15-20, and 22-28 are not rendered obvious by the proposed combination of MAPICS, Wong, and DataMirror. The Applicant further submits that claims 15-20 and 22-28 are in condition for allowance. Therefore, the Applicant respectfully requests that the rejection of claims 15-20 and 22-28 be reconsidered and that claims 15-20 and 22-28 be allowed.

The Legal Standard for Obviousness Rejections Under 35 U.S.C. § 103:

To establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, and not based on applicant's disclosure. *In re Vaeck*, 947 F.2d 488, 20 U.S.P.Q.2d 1438 (Fed. Cir. 1991); M.P.E.P. § 2142. Moreover, all the claim limitations must be taught or suggested by the prior art. *In re Royka*, 490 F.2d 981, 180 U.S.P.Q.

580 (CCPA 1974). If an independent claim is nonobvious under 35 U.S.C. § 103, then any claim depending therefrom is nonobvious. *In re Fine*, 837 F.2d 1071, 5 U.S.P.Q.2d 1596 (Fed. Cir. 1988); M.P.E.P. § 2143.03.

With respect to alleged obviousness, there must be something in the prior art as a whole to suggest the desirability, and thus the obviousness, of making the combination. *Panduit Corp. v. Dennison Mfg. Co.*, 810 F.2d 1561 (Fed. Cir. 1986). In fact, the absence of a suggestion to combine is dispositive in an obviousness determination. *Gambro Lundia AB v. Baxter Healthcare Corp.*, 110 F.3d 1573 (Fed. Cir. 1997). The mere fact that the prior art can be combined or modified does not make the resultant combination obvious unless the prior art also suggests the desirability of the combination. *In re Mills*, 916 F.2d 680, 16 U.S.P.Q.2d 1430 (Fed. Cir. 1990); M.P.E.P. § 2143.01. The consistent criterion for determining obviousness is whether the prior art would have suggested to one of ordinary skill in the art that the process should be carried out and would have a reasonable likelihood of success, viewed in the light of the prior art. Both the suggestion and the expectation of success must be founded in the prior art, not in the Applicant's disclosure. *In re Vaeck*, 947 F.2d 488, 20 U.S.P.Q.2d 1438 (Fed. Cir. 1991); *In re O'Farrell*, 853 F.2d 894 (Fed. Cir. 1988); M.P.E.P. § 2142.

A recent Federal Circuit case makes it clear that, in an obviousness situation, the prior art must disclose each and every element of the claimed invention, and that any motivation to combine or modify the prior art must be based upon a suggestion in the prior art. *In re Lee*, 61 U.S.P.Q.2d 1430 (Fed. Cir. 2002). Conclusory statements regarding common knowledge and common sense are insufficient to support a finding of obviousness. *Id.* at 1434-35.

CONCLUSION:


In view of the foregoing remarks, this application is considered to be in condition for allowance, and early reconsideration and a Notice of Allowance are earnestly solicited.

No fees are believed to be incurred by the filing of this Amendment. However, if a fee should be required, the Director is hereby to charge any such fee to Deposit Account No. **500777**. If an extension of time is required If there is no separate Petition for Extension of Time filed herewith, this document is to be construed as also constituting a Petition for Extension of Time Under 37 C.F.R. § 1.136(a) for a period of time sufficient to enable this document to be timely filed. Any fee required for such Petition for Extension of Time should be charged to Deposit Account No. **500777**.

Please link this application to Customer No. 53184 so that its status may be checked via the PAIR System.

Respectfully submitted,

14 SEP 2005
Date


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CUSTOMER NO. 53184
ATTORNEYS AND AGENTS FOR APPLICANT

Definition for: flow control

The control of transmission between communications devices, to make sure the sender does not send data until the receiver is ready to receive it. Flow control may be achieved by means of hardware or software. If a low-speed device is receiving a high-speed transmission, a buffer is used to store data until the receiver can accept it.

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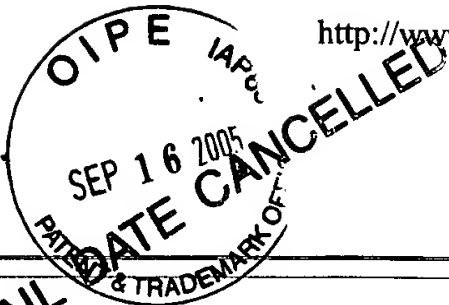
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Flow Control

In data communications, hardware or software signals that control the flow of data to ensure that it is not transmitted too quickly for the receiving computer to handle.

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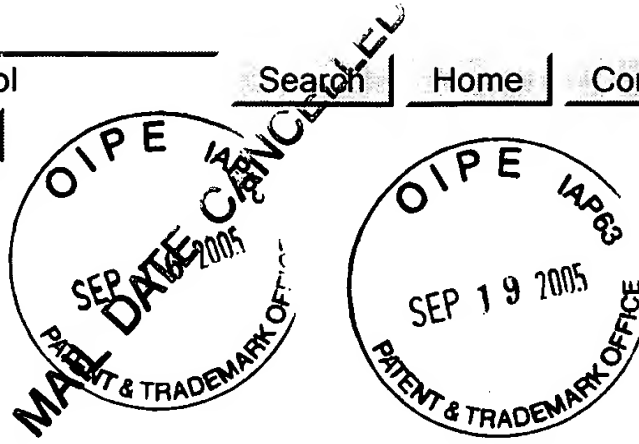
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flow control



<communications, protocol> The collection of techniques used in serial communications to stop the sender sending data until the receiver can accept it. This may be either software flow control or hardware flow control. The receiver typically has a fixed size buffer into which received data is written as soon as it is received. When the amount of buffered data exceeds a "high water mark", the receiver will signal to the transmitter to stop transmitting until the process reading the data has read sufficient data from the buffer that it has reached its "low water mark", at which point the receiver signals to the transmitter to resume transmission.

(1995-03-22)

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